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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL RAYSHELL SHELTON, Defendant and Appellant.	H025809 (Santa Clara County Super. Ct. No. CC100755)

This is a domestic violence case in which evidence of battered women's syndrome (BWS) was introduced during trial. A jury found defendant Michael Rayshell Shelton guilty of committing the following offenses against Sharon Cooper, a former girlfriend: two violations of Penal Code section 273.5, subdivision (a) (infliction of corporal injury upon cohabitant, counts 1 and 4), a violation of Penal Code section 240 (misdemeanor assault, a lesser included offense of count 2), and a violation of Penal Code section 136, subdivision (b)(1) (attempting to dissuade a victim from reporting victimization, count 3). The court granted three years of formal probation. Defendant appeals. (Pen. Code, § 1237.)

Defendant claims on appeal that the court committed reversible error by failing to instruct sua sponte regarding the limitations on the use of BWS evidence, such failure violated his federal constitutional rights to due process and fair trial, and defense counsel

rendered ineffective assistance by failing to request a limited instruction on the use of BWS evidence. He further contends that the BWS evidence without the limiting instruction amounted to improper profile evidence and should not have been admitted and, if this court determines that defense counsel did not object to BWS on the ground it was profile evidence, that failure to object constituted ineffective assistance of counsel. Defendant also argues the court erred by allowing the prosecution to call a former girlfriend, not the alleged victim of the charged crimes, in rebuttal. Finally, he urges this court find that the cumulative impact of these errors requires reversal.

We affirm.

A. *Evidence*

Sharon Cooper testified that she began dating defendant in about February 2000 and they were in a relationship for about seven months. In March 2000, they began living together in her home. She gave him a key. Cooper recalled that defendant was "[v]ery affectionate, very charming, just very, very nice" early in the relationship but he slapped her during an argument that occurred approximately two months into the relationship. She "started crying" and defendant said he was sorry, he had "just lost his head," and he would never do that again.

According to Cooper, the violence occurred "a couple times in the beginning" and was "sporadic" but became "more consistent" "[a]s the relationship grew." Defendant would apologize, saying "he was very sorry," "[he] didn't mean to do it," and "[h]e would never do it again." However, as the violence became more frequent, defendant would indicate that it was her fault because she did not back down and she was responsible for bringing it to that level and she "started to believe it." As the relationship wore on, after a violent episode, defendant sometimes would be sweet and sometimes would continue to treat her poorly. Cooper indicated that the majority of incidents occurred at home.

Cooper described an incident that occurred the Thursday before the July 4, 2000 weekend and indicated that she was able place the incident because that she "went

camping with some friends" during that weekend and "everyone was asking [her] about the bruises." Late on the night of incident, around 11:00 or 12:00 p.m., the two of them were in her car and defendant was driving. Defendant insisted on stopping at a restaurant even though Cooper wanted to go home. According to Cooper, defendant locked her in the car because she did not want to go into the restaurant. She explained that he took the key, set the car alarm, and went into the restaurant. After she found her spare key and was able to get out of the car without triggering the alarm, Cooper went into the restaurant and started yelling at him in a loud talking voice.

Cooper stated that she left the restaurant and walked to her home across the street. Defendant arrived home about a half an hour later. Defendant was angry and yelling at her because she had embarrassed him. Cooper testified that defendant slapped her a few times on her face, punched her in the arms, and grabbed her upper arms "really hard." Cooper became afraid that defendant was "going to hurt [her] worse." Defendant then left. Cooper indicated that she did not call the police that night because she was afraid.

Cooper testified that, when defendant returned the next morning, defendant "pretty much" acted like nothing happened and did not apologize. They followed through with their plans to go camping. During the camping trip, a lot of people commented on her bruises. She had "really big bruises" on the inside of her arms and "old bruises other places." She lied in response, telling them she bruised easily and they were "horse playing rough" and wrestling.

A photograph taken of Cooper in a swimsuit from that July 4 weekend, which was later provided to police according to Cooper, was admitted into evidence. Cooper testified that the bruises showing on the outside of her arms in that photo were old injuries and the new injuries were on the inside of her arms. Another photograph taken of Cooper and defendant about a week after the Thursday incident of violence before the July 4 weekend, which was also later provided to police according to Cooper, was

admitted into evidence. Cooper indicated that the additional bruises seen on her arm had been sustained during the week prior to that second photo.

Cooper testified that, on July 20, 2000, she got into an argument with defendant over her car, which defendant wanted to use. His use of her car was a big problem because he sometimes took her car when she needed to get to work and she had to find a ride. When she told him he could not use her car, he "got really upset," "jumped up," and kicked her coffee table a couple of feet across the room. Cooper then became "really mad" and yelled at defendant not to destroy her stuff. Cooper sent her nine-year-old daughter and her friend who was visiting out of the room. Cooper stated that defendant threw his drink in her face, grabbed her, and pulled her into the bedroom. She explained that she mistakenly testified at the preliminary hearing that defendant had thrown his drink in her lap rather than in her face.

Cooper testified that, in the bedroom, defendant threw a clothes hamper across the room, he yelled at her some more, he grabbed her by the throat with his hand and pushed her down on the bed, and he choked her by "pushing down hard." While defendant was choking Cooper, he was saying, " 'You fucking fuck. Fuck you, fucking bitch.' " Cooper indicated that, during the course of the relationship, defendant had put his hands to her throat about three or four times and he had called her those words a lot. At first, she did not "remember exactly" whether she was having difficulty breathing during the July 20 incident, but upon refreshing her memory with a copy of her statement to police, she testified she did not have difficulty breathing. However, Cooper stated she had been very frightened and worried that defendant would seriously hurt her. Cooper recalled that she fell to the floor on her behind after defendant stopped strangling her and, when she tried to get up, defendant kicked her in the chest two times, which knocked the wind out of her. When Cooper told defendant she was going to call the police, he warned her if she "did anything to get him in trouble, he would fucking kill [her]." Defendant then left.

Cooper testified that she believed defendant's threat and did not call the police because she was afraid. Instead, she right away called her friend, Conni Chaffin and told her defendant had become violent with her. She recalled that, when she spoke to Chaffin, she was crying and "panicked, upset, a little hysterical." Chaffin told Cooper to call the police. Cooper was afraid that defendant "would get worse, more mad." Chaffin told Cooper she was going to call the police.

Cooper testified that Chaffin called back and said she had called police. When the police came to the house, Cooper told them nothing had happened because she was afraid. She stated that her neck was red, her throat hurt, and her voice was raspy. She indicated that the police stayed a long time and did not appear to believe her story that nothing happened. Cooper recalls being "pretty mad" at Chaffin. Cooper stated that she "stopped talking to her."

Cooper recalled that, several hours later, defendant, who had taken her car without permission, returned home. Defendant was very sorry but indicated the incident occurred because Cooper would not back down.

Cooper testified that she had problems at work during the period she was involved with defendant because she could not concentrate, she was depressed, and she missed a lot of work. Her employer, Dr. Gerald Bittner, asked her why she was always sick and what was going on. He sometimes commented on her bruises.

Cooper indicated that defendant was taken into custody on August 10, 2000 for some traffic violations. At that point, she already suspected that he was being unfaithful to her because there were some nights when he did not come home. After defendant went into custody, she used his cell phone for a couple weeks. During that time, she answered some phone calls from some females. She denied ever accusing a woman named Melanie of having an affair with defendant.

Cooper testified that she almost immediately began thinking about leaving him because she was unhappy but she did not know how to get out of the relationship and

"that was [her] out." Cooper stated that she "was very frightened" at that time. She clarified that infidelity was "[n]ot the main factor" in wanting to end the relationship and the main factor was "[j]ust living in fear all the time."

Cooper testified that, while defendant was in custody, she told him a few times that she did not want to be with him anymore. While he was still in custody, defendant warned that he would bash in her "fucking face" if she "did anything to get him in trouble or got rid of his stuff." According to Cooper, at some point defendant told her that his friend Marcus would come by to pick up his stuff but "no one ever showed up." Cooper completely cut off their relationship in about mid-September.

In about mid-November 2000, Cooper, encouraged by Chaffin, reported to police that defendant had used her credit card without her permission. At that time, Cooper told police that defendant was violent, he would be very angry if he found out she had reported him, and she was afraid of him but she did not give any details of domestic violence.

Cooper stated that in late November or early December, after defendant had been released from jail, he left a friendly message on her answering machine. She did not respond. By this time, Cooper had given all of defendant's belongings to Goodwill, except his watch, which she gave to her brother. Defendant called her at work numerous times but she did not take any of the calls.

Cooper indicated that in December 2000, she was still afraid defendant was going to hurt her because of the threat he had made while in custody. On December 5, 2000, she reported the phone calls to police because she was afraid. She spoke with Officer Aguilar at her work and told him that defendant had been abusive but did not tell him about any specific incident. She was advised to obtain a restraining order, which she did.

Cooper testified that, on December 16, 2000, she received an e-mail message from defendant, which she took as a threat, and reported it to police. The e-mail indicated in part that there was a picture clearly showing Cooper's face and asked about her nose.

Cooper testified that at the time she took that as a threat because "in the past he's always talking about bashing my face in." She later discovered he might have been referring to a photograph of her using drugs. She testified that she had tried drugs once in a limo on the night of her birthday. The e-mail also contained the statement: "Children's custody will be pleased to say that innocent mother who feels victimized by the supposed thief." She also took that statement as a possible threat of physical violence.

Cooper further testified that she made another police report in January 2001 after she found a dead rat on her car, which she believed defendant had put there. Sergeant Yazzolino then contacted Cooper. Cooper testified that she spoke with Sergeant Yazzolino and told him about the July 20, 2000 incident. She indicated that she made a full report to Sergeant Yazzolino in January 2001 because of defendant's contact with her and his failure to leave her alone and because Chaffin had encouraged her to make a report.

Sergeant David Yazzolino, an officer with the San Jose Police Department, testified that he worked in the domestic violence unit and took the initial police report from Cooper in January. He stated that Cooper was "very thorough in her statement," there were certain points during the story when "she began to shake, visibly shake," and "[s]he broke down and cried on several occasions throughout the interview." He did not recall Cooper telling him about any injury to her face and acknowledged that his report states that Cooper told him she had sustained bruises to her arms, leg, and neck, but there is no mention of any bruising to the face.

Conni Chaffin testified that, on July 20, 2000, she called 911 on Cooper's behalf. Chaffin explained that Cooper had telephoned "in absolute panic and terror." Cooper, who was crying, told her that "she had just gotten beat up and [defendant] had broken a bunch of things and he took her car and left and she didn't know what to do." Chaffin recalled that Cooper said "he had thrown her up against the wall," he had choked her and

smacked her around, and told her "he was going to kill her." Cooper said "he had broken the coffee table and broken other stuff in the house."

Chaffin testified that she feared for Cooper's safety and she told Cooper she was going to call 911. Although Cooper told her not to call police, she called anyhow. Chaffin then called Cooper back.

Chaffin testified that her relationship with Cooper changed because she called 911. They "didn't talk to each other at all" for some time and Cooper was angry with her during that period.

Cynthia MacDermott testified that she was a very good friend of Cooper. However, while Cooper was dating defendant, MacDermott saw Cooper minimally and saw defendant about three times. MacDermott went on a camping trip with them the summer of 2000 before the Fourth of July. During that trip, MacDermott noticed unusual marks on Cooper's body, specifically on the right inner arm and right thigh. She saw "huge bruises and [*sic*] abnormal places that probably [were] two inches in diameter, each bruise." MacDermott recalled asking Cooper how she got the bruises and Cooper telling her they were "playing around, arm wrestling, and wrestling around."

Dr. Gerald Bittner, Jr. testified that Cooper had worked in his dental office as a dental assistant. He stated that Cooper, who had been "a very outgoing, very caring person and very responsible," became "less talkative, smiled very little," "was not as responsible, came late to work sometimes, didn't show up" during the period of March 2000 through the summer of 2000. During that period, he noticed bruises on her arms and, one time, he noticed bruises on her neck. "[T]owards the end of the summer, she came to work with a black eye." When he asked about the injuries or bruises, Cooper indicated some accident had occurred. Cooper began wearing long sleeves and turtlenecks instead of her usual summer attire.

During September or October 2000, when Dr. Bittner told Cooper he would have to "let her go" because of her work performance, Cooper finally confided that "her former

boyfriend had been abusing her and hitting her, and that's why she was not showing to work." Cooper had indicated that "[s]he didn't want her co-workers to see her injuries." She was "very embarrassed."

Susan Wong testified that she had dated defendant for about a year, beginning about September 1998. She described an incident that occurred after she had repossessed defendant's car, which she had purchased on his behalf, because he was not repaying her in accordance with their written agreement. Defendant came to her house looking for the car and they became involved in a verbal altercation. Wong told defendant she was going to call the police. When she tried to go upstairs to get a telephone, defendant followed her. They scuffled "up the stairs" and were "fighting over the phone." At some point, defendant hit her "upside the head" and ripped her sweatshirt, stomped on her foot and bruised it. She eventually managed to call 911, defendant left, and the police arrived. Wong further testified that she was very emotional that night and told the responding officer that she did not want to press charges at that time and wanted to think about it. She indicated that she subsequently took steps to obtain a restraining order against defendant.

Wong recalled two other previous times that defendant put his hand on her in anger. Once when they were arguing about the car, defendant, who was lying on the couch, "pushed his foot up and kicked [her] in the chest." The kick threw her back and hurt but did not knock the wind out of her. Another time when they were arguing about the car, defendant grabbed her by the neck and pushed her down on the couch.

Richard Ferry, a licensed marriage and family therapist, testified regarding battered women's syndrome and domestic violence. He explained that BWS is "the effects in thought feeling behavior exhibited by women who have been battered repeatedly in an intimate relationship." He stated that "[b]attered women tend, in general, to be more anxious and more depressed than nonbattered women," more often "exhibit an excessive startle response," and are often hypervigilent.

Ferry indicated that certain features commonly, although not necessarily, existed in battered women's relationships, including isolation from friends and family, financial exploitation, threats, verbal and emotional abuse, harassment and stalking, and domestic violence against the battered person. He stated that the experience of being battered impacted women's thinking in several important ways, specifically "battered women tend to rely on the defenses of minimization and denial." Battered women also tend to excuse the abuse and believe they deserve it and very commonly blame themselves for the abuse.

Ferry indicated that there were two views explaining why such women might not cooperate with police or take action to protect themselves when an ordinary person might think, "I'd be gone in 30 seconds." One point of view was that such women's behavior was "learned helplessness." The same phenomenon was alternatively explained as an "intuitively careful avoidance of making the situation worse by provoking the man," which would place the women at greater risk.

Ferry testified that many of these women love the man they are with and believe their relationships would be wonderful if the violence would just stop. They also tend to "take on the beliefs and attitudes of the batterer about themselves" and begin to see themselves as incompetent, stupid, and unlovable, and as the cause of the men's losses of control. As a matter of psychological survival, they try to meet the men's needs and not provoke them. Ferry agreed that battered women sometimes change their stories to protect the abuser.

Ferry identified severed myths associated with domestic violence. It is a myth that a battered woman can always leave or that the relationship must not be that bad if she is staying in the relationship. Ferry explained, as an example, there might be economic pressures preventing a woman from leaving or a man might physically follow a woman and force her to return if she tried to leave. He indicated that alcoholism and drug addiction do not cause domestic violence and both problems need to be treated.

Domestic violence does not mainly affect people of color or poor people but "poor people rely on the cops to break up family fights much more than affluent people."

Ferry described the "cycle of violence" theory developed by Lenora Walker, a psychologist who has done extensive research on BWS. She proposed three phases of the cycle: tension building, violence, and loving contrition. He indicated this theory was not universally accepted and some believe the cycle of violence does not involve loving contrition; rather, it involves only one episode after another. Ferry stated that, without treatment, the violence becomes more severe and more frequent.

Ferry acknowledged that he did not know defendant or Cooper at all, he had never met or examined Cooper, and he did not know the specific facts of this case. He agreed that he did not know if Cooper was a battered woman or not or whether she suffers from BWS.

David Loperena, a longtime friend of defendant, testified that he socialized with defendant and Cooper while they were dating. He had not seen Cooper with injuries and had not seen her act afraid. He did not know defendant to be a violent person. He indicated that Cooper had used drugs on numerous occasions, "[p]robably every occasion we got together." He recalled that, on the night defendant had met Cooper, those two and other people had taken a limo to a club in San Francisco. According to Loperena, cocaine was used that night.

Loperena also testified that he had lived with defendant and Heather Smithheart for two or three years and he never saw defendant hit her. He claimed that Smithheart and he were very close and, if defendant had hit her, she would have said something to him.

Terry McCafferty, a retired police officer, testified that he had been working for the Fremont Police Department on June 4, 1999. On that date, he responded to a disconnected 911 call and contacted Susan Wong. He described Wong as being in a highly emotional state when he arrived. Wong told him that her boyfriend by the name

of Mike Shelton, whom was identified in court as defendant, had struck her but she could not recall how or where she was struck. She showed McCafferty a bruise on the top of her foot and a small bruise to her calf. The bruises did not look fresh to McCafferty.

Robert Petitjean, who had been an officer with the San Jose Police Department for 24 years, testified that the CAD (computer-aided dispatching) printout showed he had been dispatched to Cooper's address on July 20, 2000 but he did not recall it. Officer Petitjean stated that he was told that no police report was generated from that event. He indicated that he had received training in responding to domestic violence calls and had responded to numerous domestic violence calls. He agreed that a police report would be generated if police responded to a report of domestic violence and saw "substantial evidence" that "something did happen." On cross-examination, he acknowledged that it was common for domestic violence victims to not want to give a report or have the police make an arrest. The officer estimated that he had responded to between 250 and 300 domestic violence calls over the course of his police career of 27 years but had written reports on only about 50 to 60 of those calls. However, he indicated that even if the alleged victim does not want to press charges, he generally would write a report if he could "establish the criteria for a domestic violence [incident]." He stated he "would probably write a report" if a choking incident was reported, the victim appeared to have been crying and was distraught, and he saw redness to the throat.

David Aguilar, who had been an officer with the San Jose Police Department for 20 years, testified that he had taken a report from Cooper on December 5, 2000. He stated that Cooper had told him that defendant had been "practically living with her" and had been there all the time. Officer Aguilar had written in his police report that Cooper had not talked to defendant since August. However, his report indicated that Cooper was complaining that defendant was calling her at work and had called her at work that day. His report also indicated that Cooper had been harassed at home by a phone call but defendant was not the caller.

The defendant's father testified that he met Cooper twice when visiting his son while he was incarcerated. Cooper never indicated to him that defendant had been physically abusive toward her.

Melanie Shayne testified that defendant and she dated from about October 1998 until March 2000. They were sexually active but she did not consider the relationship exclusive. She indicated that defendant was never violent with her, he was not aggressive or hostile in any way, and his behavior during the relationship did not frighten her in any way.

Shayne remembered that she had learned from Cooper that defendant was in jail when she called defendant's cell phone number and Cooper had answered. Shayne met Cooper when she went to visit defendant in jail in about early September 2000 and saw Cooper holding defendant's hands across a table.

According to Shayne, when she telephoned approximately a few days later, Cooper asked, " 'Were you having sex with Michael when I started seeing him?' " Cooper indicated to Shayne that another girl had telephoned defendant's phone and Cooper had learned during that conversation that the girl had been sleeping with defendant for a "year or whatever . . . ." Shayne told Cooper she had not "slept with him since March." Cooper sounded angry and said she was going to sell his stuff. Shayne told Cooper that defendant had some of her CDs and asked Cooper to hold onto them for her. Cooper never returned Shayne's subsequent phone calls.

Elizabeth Mello testified that she had been in a relationship with defendant for about two years, since about January 2001, and they were living together at that time. She stated there had been no physical violence in their relationship, he had not shown any aggression toward her, and he had not placed her in fear of physical harm during their relationship.

Cooper's daughter, who was 12 at the time of trial in December 2002, was called as a witness by the defense. She remembered that, during the time defendant had lived

with her mom, she had heard defendant and her mom arguing in her mom's bedroom sometimes but she agreed that she had not seen them yelling or seen defendant push, hit, or shove her mom. The daughter did remember seeing defendant throwing a table across the room in front of her and a girlfriend and acknowledged defendant and her mom had been arguing at that time. She remembered seeing her mom upset or crying sometimes while defendant was living there but did not know the reason for her mom's upset. She could not remember seeing or hearing anything that made her think defendant was hitting her mom. Cooper's daughter remembered that defendant had taken her mom's car several times without her mom's permission, and defendant and her mom argued about that a lot.

Heather Smithheart, whom the People called on rebuttal, testified that she had been involved in a relationship with defendant for almost seven years and he was her son's father. She stated that, about a year before they broke up, when she was about five or six months pregnant, defendant hit her and gave her a black eye. Smithheart indicated that defendant had a temper and he might throw or hit something or slam a door when he got mad.

Sergeant David Yazzolino further testified that he contacted Smithheart during his investigation and she had told him that she had been "emotionally and physically abused by the defendant" throughout the relationship. However, she could give details as to only one incident and could not recall any specifics in regard to other incidents.

B. *Limiting Instruction on Battered Women's Syndrome*

Evidence Code section 1107, subdivision (a),[1] provides: "In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except

[1] All further statutory references are to the Evidence Code unless otherwise specified.

when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge." Section 1107 further states: "The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness." (§ 1107, subd. (b).)

Defendant insists that the trial court should have given CALJIC No. 9.35.1, a cautionary instruction regarding BWS evidence. That standard instruction provides in relevant part: "Evidence has been presented to you concerning battered women's syndrome. [This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crime[s] charged.] [¶] [Battered women's syndrome research is based upon an approach that is completely different from the approach which you must take to this case. The syndrome research begins with the assumption that physical abuse has occurred, and seeks to describe and explain common reactions of women to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of providing guilt beyond reasonable doubt.] [¶] You should consider this evidence for certain limited purposes only, namely, [¶] [that the [alleged victim's] . . . reactions, as demonstrated by the evidence, are not inconsistent with [her] having been physically abused] [,or] [the beliefs, perception or behavior of victims of domestic violence] . . . ." (CALJIC No. 9.35.1 (Jan. 2004 ed.) p. 524.)

"[A]bsent a request by defendant, the trial court has no sua sponte duty to give a limiting instruction. (Evid.Code, § 355 [trial court must restrict evidence to its proper scope and so instruct the jury if a party requests a limiting instruction]; see *People v. Nudd* (1974) 12 Cal.3d 204, 209 . . . [Evidence Code section 355 does not require sua sponte limiting instruction], revd. on other grounds in *People v. Disbrow* (1976) 16 Cal.3d 101, 113 . . . .)" (*People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3.) Where a defendant fails to request a limiting instruction, a trial court has no obligation to give

such an instruction on its own initiative. (See *People v. Champion* (1995) 9 Cal.4th 879, 947; *People v. Richards* (1976) 17 Cal.3d 614, 618, disapproved on another point by *People v. Carbajal* (1995) 10 Cal.4th 1114, 1126.) Thus, although the trial court was obligated to instruct sua sponte on the general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case (*People v. Breverman* (1998) 19 Cal.4th 142, 154), we conclude that the court was not required to instruct on battered women's syndrome in the absence of a defense request. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5.)

Nevertheless, defendant claims that the court was required to instruct sua sponte regarding the limited purpose of BWS evidence, citing *People v. Housley* (1992) 6 Cal.App.4th 947, a case involving child sexual abuse accommodation syndrome (CSAAS). Evidence of CSAAS, like BWS evidence, is properly used to show behavior of an alleged victim, such as a failure to report, a delay in reporting, or a recantation, is not necessarily inconsistent with being a victim. (See e.g. *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 [CSAAS evidence "admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation" but is inadmissible to "prove that a molestation actually occurred"]; *People v. Humphrey*, *supra*, 13 Cal.4th at pp. 1083-1084, 1088 [BWS relevant to explain a behavior pattern that might otherwise appear unreasonable to the average person]; *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594 [BWS evidence relevant to explain recantation].)

Housley, supra, 6 Cal.App.4th 947, held that, "in all cases in which an expert is called to testify regarding CSAAS," a court must instruct sua sponte that "(1) such evidence is admissible solely for the purpose of showing the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Id*. at p. 959.) Its holding was based on "the

potential for misuse of CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused." (*Id*. at pp. 958-959.) The court explained: "The frequency with which defendants recently have challenged the alleged misuse of CSAAS evidence suggests this type of testimony may be unusually susceptible of being misunderstood and misapplied by a jury, perhaps because the expert commonly is asked to offer an opinion on whether the victim's behavior was typical of abuse victims, an issue closely related to the ultimate question of whether abuse actually occurred. [Citations.] Such testimony, especially from one recognized as an expert in the field of child abuse, easily could be misconstrued by the jury as corroboration for the victim's claims; where the case boils down to the victim's word against the word of the accused, such evidence could unfairly tip the balance in favor of the prosecution." (*Id*. at p. 958.)

Defendant argues that there is no rational distinction between child sexual abuse accommodation syndrome and battered women's syndrome. He points out that the comment following the standard cautionary instruction on CSAAS states that a "court has a sua sponte duty to give a limiting instruction whenever CSAAS is presented to the jury by the prosecution," citing *People v. Housley*, *supra*, 6 Cal.App.4th 947. (Com. to CALJIC No. 10.64 (Jan. 2004 ed.) p. 695.) He also directs us to the comment following CALJIC No. 9.35.1, which states "in light of appellate court treatment of child abuse and rape trauma syndrome evidence (see CALJIC No. 10.64 and the comment thereto), this instruction is available should the trial court conclude that a limiting and explanatory instruction is required." (Com. to CALJIC No. 9.35.1 (Jan. 2004 ed.) p. 525.) He asserts that "this comment implicitly *endorses* the use of CALJIC 9.35.1 as a *sua sponte* instruction."

We begin by noting that published jury instructions are "not themselves the law, and are not authority to establish legal propositions or precedent." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) While we understand the concerns of the *Housley* court,

the possibility of abuse is present whenever evidence that is not generally admissible is introduced. However, it has never been the rule, for example, that a court must instruct sua sponte regarding the limited use of an out of court statement not admitted for the truth of the matter (see § 1200) or character evidence admitted for a proper purpose other than to prove disposition to commit act or conduct on a specified occasion (see § 1101, cf. § 1109) even though the jury might possibly misuse the evidence to the serious prejudice of the defendant in the absence of a limiting instruction. (See *People v. Farnam* (2003) 28 Cal.4th 107, 163-164 [character evidence]; *People v. Woodell* (1998) 17 Cal.4th 448, 460 [hearsay evidence]; *People v. Collie* (1981) 30 Cal.3d 43, 63-64 [character evidence]; cf. *People v. Jones* (2003) 30 Cal.4th 1084, 1116 [court had no duty to give limiting instruction regarding gang membership evidence without request].) We are not persuaded that the trial court had a sua sponte obligation to give a limiting instruction regarding battered women's syndrome. (See § 355; see also *People v. Padilla* (1995) 11 Cal.4th 891, 950, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

In any event, even assuming the trial court had such a sua sponte obligation to instruct, reversal is not required. In this case, Richard Ferry, a licensed marriage and family therapist, testified regarding Battered Women's Syndrome. He described BWS as "the effects in thought feeling behavior exhibited by women who have been battered repeatedly in an intimate relationship." While he described the common features of such relationships, the common behaviors and responses of battered women, and common myths about domestic violence, Ferry acknowledged that he did not know the defendant or the alleged victim at all and did not know the specific facts of this case. He stated that he did not know whether Sharon Cooper was a battered woman or whether she suffers from BWS.

Cooper testified regarding the two specific incidents of domestic violence and the nature of her relationship with defendant. That testimony was corroborated in various

respects by the testimony of Cooper's friends Chaffin and MacDermott, and Cooper's former employer Dr. Bittner. Cooper's daughter confirmed that defendant had once thrown the coffee table in front of her and her friend. There was also testimony from two of defendant's past girlfriends indicating that he had been physically abusive at times, from which the jury could infer a disposition to engage in domestic violence. (§ 1109, subd. (a).)

The prosecutor indicated to the jury in closing argument that it could not use Ferry's testimony to decide Cooper had been battered: "[H]is testimony is only to assist you *if* you find that Sharon Cooper was a battered woman or was suffering from those effects of being a batterer [*sic*]. . . . And you're not allowed to use his testimony for him to come up here and say that, yeah, I looked at Sharon Cooper. She's a battered woman and that guy battered her. That would be wrong. The law doesn't allow that. He's just telling you and informing you as to what happens with a battered woman, what are their perceptions, what are their realities because they're not our realities, they're very different. . . . It's for you decide if Sharon Cooper fits some of the things that he talked about." (Italics added.) While the prosecutor then proceeded to discuss the many similarities between BWS and the features of defendant's relationship with Cooper and suggested those features were present "because it was an abusive relationship" and not coincidentally, and Cooper "was taking on the characteristics of a battered woman," he argued in closing that defendant was guilty of the charged offenses beyond a reasonable doubt based upon the testimony of the victim, Cooper's personal photographs, and the testimony of other corroborating witnesses. He did not directly urge the jury to infer from the similarities between Cooper's relationship with defendant and battered women's relationships in general that the charged acts of abuse occurred.

Defendant argues that the prosecution implied that "because the victim exhibited the symptoms of BWS, violence must have occurred." He maintains that the lack of instruction was prejudicial given the powerful impact of expert testimony, citing *People*

v. Gomez (1999) 72 Cal.App.4th 405, disapproved in *People v. Brown* (2004) 33 Cal.4th 892. In *Gomez*, the appellate court, after concluding that evidence of a single violent incident without evidence of other abuse was insufficient to establish that a woman suffered from battered women's syndrome, found the trial court committed reversible error by admitting expert testimony regarding BWS. (*Id*. at pp. 417-419.) The appellate court determined that admission of irrelevant BWS evidence was highly prejudicial to defendant Gomez since both the trial court and the prosecutor emphasized the expert's inflammatory testimony, which was "authoritative" and "lengthy and dramatic." (*Id*. at p. 419.)

In *Brown, supra*, 33 Cal4th 892, the Supreme Court concluded expert testimony concerning the behavior of victims of domestic violence was admissible under Evidence Code section 801 (admissibility of expert opinion testimony) even though the evidence showed only one violent incident because the "evidence presented at trial suggested the possibility that defendant and [his live-in girlfriend] were in a 'cycle of violence' of the type described by [the] expert" on the evening of the assault. (*Id*. at p. 907.) The Supreme Court disapproved "any language" in *Gomez* contrary to its conclusion. (*Id*. at p. 908.) The Supreme Court explicitly stated that it was not reaching the question whether the expert testimony was also admissible under Evidence Code section 1107. (*Id*. at p. 896.)

It is unclear what remains of the *Gomez* decision since it concerned only Evidence Code section 1107. In any event, we find *Gomez* inapposite since the appellate court in that case was evaluating the prejudice of admitting of BWS evidence that it believed was completely irrelevant and it was not evaluating a failure to instruct in accordance with CALJIC 9.35.1 where expert testimony regarding BWS was considered relevant.

In this case, there was evidence that an abusive relationship had developed between Cooper and defendant involving more than one act of abuse. The BWS evidence properly provided a possible explanation for Cooper's behavior of initially

telling police that nothing had happened on July 20, 2000, continuing her relationship with defendant for some time despite the alleged physical abuse, and failing to immediately report the charged incidents to police.

Appellate review under *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*People v. Breverman, supra,* 19 Cal.4th at p. 177.) After an examination of the entire case, including the evidence, we conclude there is not a reasonable probability that a result more favorable to defendant would have been reached had the cautionary instruction regarding BWS evidence been given. (*People v. Watson, supra,* 46 Cal.2d 818, 835-836; see *People v. Housley*, *supra*, 6 Cal.App.4th at p. 959.)

C. *Due Process and Fair Trial*

Citing *People v. Sengpadychith* (2001) 26 Cal.4th 316, defendant maintains that admission of BWS evidence without the limiting instruction (CALJIC No. 9.35.1) violated his federal rights of due process and fair trial because the lack of instruction "had the effect of lightening the prosecution's burden of proof" by allowing a conviction "based upon evidence that could not in logic or in law, be used to support the conviction." In *Sengpadychith*, the California Supreme Court held that "a trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision 'increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.' (*Ibid*.)" (*Id*. at p. 326.) The court's holding was based upon the "federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment," which "require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182].)" (*Id.* at p. 324.)

There is no suggestion in this case that the trial court failed to instruct on any element of a charged crime or on an element of a sentence enhancement as in *Sengpadychith*. Here, the trial court indicated that the presumption of innocence "places upon the People the burden of proving him guilty beyond a reasonable doubt" and defined "reasonable doubt." The court instructed: "[E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt. Each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." The court also admonished the jury: "[I]f you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses." It further instructed: "If you find other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime."

The omitted instruction did not concern the standard of proof or an element of the offense or a sentence enhancement. Consequently, its absence did not unconstitutionally lighten the burden of proof.

D. *Ineffective Assistance of Counsel*

Defendant also argues that the failure to request CALJIC No. 9.35.1 constituted ineffective assistance of counsel. "To prevail on a claim of ineffective assistance of counsel, a defendant ' "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice." ' (*People v. Hart*, *supra*, 20 Cal.4th at p. 623.) . . . [P]rejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694 [104 S.Ct. at p. 2068].)" (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

As previously indicated, the evidence in this case showed that Cooper had immediately reported the July 20, 2000 incident to her friend even if she initially denied the incident when questioned by police. There was photographic evidence of bruises sustained by Cooper and testimonial evidence supporting her claims of abuse. Bruises had been seen on Cooper by MacDermott and her employer Dr. Bittner and, faced with dismissal from her job, Cooper had finally confided in Dr. Bittner that she had been in an abusive relationship. As already discussed, the prosecutor did not expressly urge the jury to infer that the specific charged acts of abuse occurred because of the similarities between the features of battered women's relationships and the features of Cooper's relationship with defendant.

We conclude that defense counsel's failure to request CALJIC No. 9.35.1 does not warrant reversal since there is not a reasonable probability that the result of the proceeding would have been different in the absence of counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

E. *Profile Evidence*

"When BWS testimony is properly admitted, testimony about the hypothetical abuser and hypothetical victim is needed for BWS to be understood. To the extent that the expert testimony suggests hypothetical abuse that is worse than the case at trial, it may even work to the defendant's advantage. In any event, limiting the testimony to the victim's state of mind without some explanation of the types of behaviors that trigger BWS could easily defeat the purpose for which the expert is called, which is to explain the victim's actions in light of the abusive conduct." (*People v. Gadlin* (2000) 78 Cal.App.4th 587, 595.) However, BWS evidence is not admissible to prove the

occurrence of the charged acts of abuse (§ 1107, subd. (a)), such as by inference from evidence of the typical batterer's behavior.

Defendant argues that the BWS evidence in this case amounted to prohibited profile evidence absent the limiting instruction because it provided a profile of the typical batterer. He maintains admission of the evidence constituted a violation of due process because the "testimony and closing arguments emphasized the close fit between appellant and the 'typical batterer' " and made it "highly probable" that the jury convicted him because he fit the profile.

"A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime. One court has described profile evidence as 'a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.' (*U.S. v. McDonald* (10th Cir. 1991) 933 F.2d 1519, 1521.)" (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.) "Profile evidence is generally inadmissible to prove guilt." (*Ibid*.) "[P]rofile evidence is inherently prejudicial because it requires the jury to accept an erroneous starting point in its consideration of the evidence. We illustrate the problem by examining the syllogism underlying profile evidence: criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion. The problem is the major premise is faulty. It implies that criminals, and only criminals, act in a given way. In fact, certain behavior may be consistent with both innocent and illegal behavior . . . ." (*Id*. at p. 1085.)

In this case, the prosecution filed a motion in limine to admit BWS evidence, specifying that "the People intend to present expert evidence to assist the jury in understanding why a victim of domestic violence might delay in reporting abuse to authorties." Defense counsel moved to exclude such evidence on the ground there was "no reliable corroborating evidence of a pattern of ongoing abusive behavior or domestic violence" and, regardless, such evidence was inadmissible to prove Cooper was actually

abused or suffers from BWS. At the hearing prior to trial, the prosecution indicated that the evidence was being offered to explain the perspectives of battered women, their lack of reporting and denial of abuse, and their willingness to remain in abusive relationships. These are proper purposes for such evidence. (§ 1107, subd. (a); cf. *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1213-1217.) The record does not indicate the court admitted BWS evidence for the improper purpose of proving the charged offenses by establishing the typical profile of batterers.

We reject defendant's further argument on appeal that, if defense counsel failed to object to inadmissible profile evidence, that failure constituted ineffective assistance of counsel. Again, the record does not show that BWS evidence was offered by the prosecution or admitted by the court to establish the profile of a typical batterer. Consequently, defense counsel had no basis for objecting to admission of the BWS evidence on the ground it was inadmissible profile evidence. To the contrary, the record indicates that the BWS evidence was admitted for a proper purpose.

As already discussed, it was up to the defense attorney to request a limiting instruction to guide the jury regarding the proper purposes of BWS evidence. (See § 355.) In addition, it was up to the defense attorney to object if the prosecutor urged the jury to use the evidence for an improper purpose during closing argument. No such objection was interposed and no separate claim of prosecutorial misconduct is raised in this appeal. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1215 ["Generally, a reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial"].)

F. *Rebuttal Evidence*

Defendant argues that the testimony of Smithheart, his former girlfriend, that he had once struck her during an argument "in no way responded" to the defense evidence that Cooper "had fabricated her claims of domestic violence out of jealously and anger" toward him and was not proper rebuttal evidence. He argues that Smithheart's testimony

should have been introduced in the prosecution's case-in-chief, like the testimony of former girlfriend Susan Wong, since Smithheart's testimony was section 1109 disposition evidence and the court erred in admitting Smithheart's testimony in rebuttal. He further argues that the error was prejudicial because defense counsel did not ask Cooper "certain questions about her prior contact with Smithheart" since Smithheart had not been expected to testify and the timing of Smithheart's testimony "unduly magnified" her testimony. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 761.)

At trial, defense counsel objected to Smithheart being called on rebuttal on due process grounds, indicating he objected to "the People reopening [its case] to put on only 1109 evidence" because he might have cross-examined Cooper regarding her contact with Smithheart if he had known Smithheart would be called as a witness, and on section 352 grounds, contending the evidence would involve an "undue consumption of time." The trial court overruled the objections, stating: "I don't think it's an undue consumption of time. We're in fact four days ahead of schedule as it is. We got into this state largely because I resisted the suggestion by the People that they be given a little time to locate this witness and I insisted that we go forward and the Defense put on their witness. . . . It's proper 1109 evidence and I do not think it's an [*sic*] due process because you certainly can call back. We have time if you would like to call back Ms. Cooper today to ask her any questions. You would be free to do so."

It appears that defense counsel did not specifically argue that the prosecution had improperly withheld Smithheart's testimony from its case-in-chief in order to unduly amplify the impact of her testimony. However, even if such objection was implicit in the objections made, we find the court acted within the scope of its discretion.

The Supreme Court has "long criticized the prosecution's use of a crucial witness on rebuttal when the witness was available and known to the prosecution during the prosecution's case in chief. [Citations.]" (*People v. Mosher* (1969) 1 Cal.3d 379, 399, disapproved on another point by *People v. Ray* (1975) 14 Cal.3d 20, 30, 32.) The court

has recognized: " 'If evidence is directly probative of the crimes charged and can be introduced at the time of the case in chief, it should be.' (*People v. Thompson* (1980) 27 Cal.3d 303, 330 [165 Cal.Rptr. 289, 611 P.2d 883].) '[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.' (*People v. Carter* (1957) 48 Cal.2d 737, 753-754 [312 P.2d 665].)" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 761.)

Nevertheless, the order of proof rests in the sound discretion of trial court. (Pen. Code, § 1094, see § 1093.) " 'The decision to admit rebuttal evidence over an objection of untimeliness rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion.' (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1232 [9 Cal.Rptr.2d 628, 831 P.2d 1210].)" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 761.)

The record in this case indicates that Heather Smithheart was named on the People's proposed witness list and the prosecution reiterated its intent to call her before trial. The court indicated that it would allow her testimony at trial. Consequently, the defense cannot legitimately claim surprise. In addition, after Wong testified, the defense called the police officer that had responded to her 911 call, who testified her bruises did not look fresh. Consequently, "[t]he calculus changed after the defense had presented its case . . . ." (*Id*. at p. 762.) The court explained in overruling the defense's objection that it had pressed the prosecution to proceed with its case in chief without Smithheart when she could not be located but would be willing at that point to allow defense counsel to cross-examine Cooper further if so desired. Finally, Smithheart's testimony was not "directly probative of defendant's guilt of the crimes charged." (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 762; see *People v. James* (2000) 81 Cal.App.4th 1343, 1356-1357 ["Propensity evidence relates directly to the defendant's character, and only indirectly to

the current charges by comparison between the circumstances of the current and prior offenses"].) Under all these circumstances, it was neither an abuse of discretion nor a due process violation to permit Smithheart to testify on rebuttal even though she was known to the prosecution before trial and could have been used during the prosecution's case-in-chief.

G. *Cumulative Error*

Defendant finally asserts that the cumulative effect of the trial errors requires reversal. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845.) We have found no trial court errors. Even if we assume that the trial court had a sua sponte duty to give CALJIC No. 9.35.1 and competent counsel would have requested it, either omission concerns the same instruction. Consequently, there is no cumulative prejudicial effect to assess. Defendant was not deprived of a fair trial.

The judgment is affirmed.

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ELIA, Acting P. J.

I CONCUR:

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BAMATTRE-MANOUKIAN, J.

Concurring opinion of McAdams, J.

I concur in the judgment but I write separately to express my view that some cautionary instruction limiting the use of battered women's syndrome (BWS) evidence must be given by the court sua sponte.

BWS evidence is no different from evidence involving child sexual abuse accommodation syndrome (CSAAS), rape trauma syndrome, or other "syndrome evidence." In general, such evidence consists of expert testimony "regarding the characteristics typically exhibited by those who have undergone a specific type of traumatic experience – most often, rape, child molestation, or battering." (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 48, p. 582.) "In a criminal case, it may . . . be used by the prosecution to rebut a claim that the victim's behavior following the alleged crime was inconsistent with the crime having occurred." (*Ibid*.)

Such evidence is properly admitted to show that "behavior of an alleged victim, such as failure to report, a delay in reporting, or a recantation, is not necessarily inconsistent with being a victim." (Maj. opn. p. 16.) Described another way, syndrome evidence is evidence admitted to assist the jury in its assessment of the victim's behavior. Such evidence "may not be used to corroborate the victim's claims of abuse." (*People v. Housley* (1992) 6 Cal.App.4th 947, 957 [CSAAS].) The legislature has codified this rule as to BWS evidence: it cannot be used "to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge." (Evid. Code, § 1107, subd. (a).)

Such evidence presents a "potential for misuse" and a "potential for great prejudice to the defendant in the event such evidence is misused." (*People v. Housley, supra,* 6 Cal.App.4th at pp. 958-959.) The concerns of the court in *Housley* are set forth below and in some detail in the majority opinion (maj. opn. at pp. 16-17). Based on these concerns, the court in *Housely* concluded that "it is appropriate to impose upon the courts a duty to render a sua sponte instruction limiting the use of such evidence." (*Id*. at p. 959.)

The majority opinion acknowledges the concerns of the *Housely* court but treats syndrome evidence as no different from any other limited use evidence, citing cases holding that there is no sua sponte duty to give a limiting instruction. But as *Housely* teaches us, syndrome evidence *is* different. It is presented through expert testimony. "Because juries may accord undue weight to an expert's opinion, special care must be taken to insure the jury understands its duty to independently assess the expert opinion along with and in light of all other relevant evidence. . . . Other courts and commentators also have recognized that expert testimony may require special treatment because jurors may too readily accept expert or scientific evidence that is beyond their expertise. [Citations.] [¶] . . . Such testimony, especially from one recognized as an expert in the field of child abuse, easily could be misconstrued by the jury as corroboration for the victim's claims; where the cases boils down to the victim's word against the word of the accused, such evidence could unfairly tip the balance in favor of the prosecution." (*People v. Housley, supra,* 6 Cal.App.4th at pp. 957-958.)

Even in other cases involving limited use evidence, courts have recognized the existence of the "occasional extraordinary case" where sua sponte instruction is necessary. (See, e.g., *People v. Collie* (1981) 30 Cal.3d 43, 64 [evidence of past criminal conduct]; *People v. Padilla* (1995) 11 Cal.4th 891, 950 [same], overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) It can be said that a syndrome evidence case is such an "extraordinary" case.

The unique challenges presented by a syndrome evidence case are met by an appropriate instruction to the jury. The instruction need not be elaborate. The first paragraph of CALJIC 9.35.1 suffices. CALJIC 9.35.1 is more extensive than the first paragraph, and this court has questioned some of the language now found in the second paragraph of this instruction. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387.) In the recent Supreme Court case of *People v. Brown* 33 Cal.4th 892, involving other BWS issues, the trial court instructed using language similar to the first and second paragraphs

of CALJIC 9.35.1, but that instruction was not an issue on appeal. In any event, as indicated above, the content of the instruction is not likely to be problematic.

To sum up, in my view, some cautionary instruction should have been given sua sponte. I nevertheless concur with the majority opinion that reversal is not required for the reasons set forth in the majority opinion beginning at page 18. It is worth noting that those factors are almost identical to the reasons cited by the court in *Housley* in reaching the decision to affirm in spite of the lack of a limiting instruction.

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McAdams, J.